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OCTOBER TERM, 1978

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NO. 78-1680

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LAWRENCE WASHINGTON, PETITIONER

V.

NORTON MANUFACTURING CO., RESPONDENT

• • •

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

• • •

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRUCIT

The past rulings of this Court have made it clear that discovery is a matter of right. Pursuant to these rulings, the lower Courts have in the past allowed extensive discovery prior to rendering decisions utilizing summary procedures. However, with the increasing case load on the Courts, the pendulum has begun to swing away from liberal discovery, and more toward summary disposition of cases. Such was the situation herein both in the District Court and in the Court of Appeals. This case presents this Court with the opportunity to more clearly define the limits and requirements of the discovery provisions of the Federal Rules of Civil Procedure, and again emphasize that minimum discovery is a matter of right, particularly reasonable discovery as was requested in the present matter.

Petitioner, Lawrence Washington, therefore respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 24, 1979, and that the decision below be reversed.

OPINION BELOW

The judgment of the Court of Appeals was rendered with a written opinion on January 24, 1979. A timely application for rehearing was denied on

February 21, 1979. The written opinion of the Court of Appeals for the Fifth Circuit is attached in the appendix hereto, and is reported at 588 F.2d 441 (5th Cir. 1979).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 2101.

QUESTION PRESENTED

May a Court rely on affidavits filed by a Defendant in support of its Motions to Dismiss for lack of in personam jurisdiction while at the same time denying the Plaintiff the right to discover facts with which to oppose said Motions.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

F.R.C.P. 12(c)--Motion for Judgment on the Pleadings.

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motions shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

F.R.C.P. 12(d)--Preliminary Hearings.

> The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in

subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

F.R.C.P. 56(f)--**When Affidavits are Unavailable.**

Should it appear from the affidavits of a party opposing the moiton that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depostions to be taken or discovey to be had or may make such other order as is just.

STATEMENT OF THE CASE

I.

COURSE OF PROCEEDING AND DISPOSITION IN COURTS BELOW

Petitioner, Lawrence Washington, a Louisiana citizen, filed suit against Norton Manufacturing, Inc. on September 9, 1976, in the United States District Court for the Southern District of Mississippi pursuant to 28 U.S.C. [1332. Norton Manufacturing, Inc. is a corporation organized, existing and with its principal place of business in Massachusetts. Service of process was served on the corporation at its Massachusetts address, 1 New Bond Street, Worcester, also on September 9, 1976. That same day, Washington filed interrogatories propounded to Norton on the issue of in

personam jurisdiction.

On November 8, 1976, Norton filed a Rule 12 Motion to Dismiss, attacking the jurisdiction of the Mississippi Court over its 'person'. On January 20, 1977, Washington filed a motion to defer determination of the motion to dismiss until trial on the merits and/or completion of discovery and to compel answers to interrogatories and requests for production. On January 27, 1977, supplemental interrogatories were also filed directed to the issue of jurisdiction.

Norton's first motion to dismiss was heard on January 31, 1977. At that time, the Court quashed the service of process on Norton, but granted leave to attempt to reserve process in a legal manner. All other pending motions in the cause were to be held in abeyance until the Court obtained jurisdiction over Norton.

On December 12, 1977, Washington sought to reserve legal process on Norton by serving Steven J. Head at 1502 Englewood Drive, Slidell, Louisiana. Petitioner's investigations had disclosed that Mr. Head had been employed by Norton since September, 1972, as the local field sales representative. Norton filed a second motion to dismiss on January 10, 1978. The District Court heard the motion on February 6, 1978. Service of process on Norton was quashed, but again Petitioner was granted thirty days to attempt to re-serve process.

Petitioner sought to re-serve process a third time by serving Donald W. Churchill, who it was learned was employed by Norton as a sales representative in Mississippi. Norton was served through Mr. Churchill at his residence, 1219 Foxhill Drive, Clinton, Mississippi. On February 28, 1978, Norton filed a third motion to dismiss.

In April of 1978, the deposition of Mr. Churchill was noticed for May 1, 1978, and second supplemental interrogatories were filed (making a total of three sets having been filed). Both measures were attempts to use accepted discovery methods to ascertain facts relevant to the issues raised by the motion to dismiss. On April 24, 1978, Petitioner filed a motion to defer determination of the motion to dismiss until trial on the merits and/or completion of discovery or in the alternative to compel answers to plaintiff's latest interrogatories and requests for production or in the alternative to shorten the time to answer plaintiff's interrogatories and requests for production. On the same day, Norton filed a motion for a protective order alleging that to allow Petitioner to take the deposition of Mr. Churchill would unduly prejudice and burden Norton. On April 27, 1978, at an expedited hearing, Magistrate John M. Roper ordered that Petitioner's motion be denied, that Petitioner not be allowed to take the deposition of Mr. Churchill, and that

Norton be allowed to bring on for hearing its motion to dismiss.

On May 2, 1978, the District Court heard Norton's motion to dismiss. The Court ordered that the service on Norton through Donald Churchill be quashed. Petitioner's request for thirty days' leave to attempt quasi in rem service of process was granted but made conditional on the payment of $500 in sanctions to counsel for Norton. The Court ordered that if the sanctions were not paid, the cause would be dismissed.

The $500.00 sanction was not paid, the cause was dismissed without prejudice, and an appeal to the United Stated Court of Appeals for the Fifth Circuit from the orders of the District Court dated January 31, 1978, February 6, 1978, April 27, 1978, May 2, 1978, and from the Court's dismissal of the action without prejudice.

II.

STATEMENT OF FACTS

Lawrence Washington, was employed by Avondale Shipyards, Inc. from April 4, 1969, until some time in October, 1974. Mr. Washington worked as the operator of a 'grinding' or sanding machine. These machines were equipped with grinding stones or wheels manufactured by Norton.

While so employed, Mr. Washington was injured as a result of the continuous inhalation of dust and grinding particles. The injuries were caused

by the negligence of Norton both in the manufacture of its grinding wheels and in not giving adequate warnings as to the dangerous propensities of the dust produced by said wheels. These exposures resulted in a pulmonary condition which, after extensive examination, was found to be work-related. Moreover, Mr. Washington was informed that the continuous inhalation of such particles had left him permanently disabled.

Mr. Washington brought suit in Mississippi against Norton to recover damages for the permanent damages he sustained to his lung and pulmonary system as a result of Norton's negligence.

REASONS FOR GRANTING THE WRIT

The Decision of the Fifth Circuit is in Conflict with Prior Decisions of this Court and of the Courts of Appeal.

I.

THE DECISION OF THE FIFTH CIRCUIT IS IN CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT

This Court has consistently required the lower Courts to construe the Federal Rules of Civil Procedure in favor of complete discovery.

In Hickman v. Taylor, 329 U.S. 495, 507, 67 S.Ct. 395 (1947), it was stated that:

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlaying his

> opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the others to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stages at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

Further, as this Court stated in Schlangenhauf v. Holder, 379 U.S. 104 at 114, 85 S.Ct. 234 (1964):

> "We enter upon determination of this construction with the basic premise 'that the deposition-discovery rules are to be accorded a broad and liberal treatment,' Hickman v. Taylor, supra, at 507 to effectuate their purpose that 'civil trials in the federal courts no longer need be carried on in the dark.' Id., at 501."

Moreover, in United States vs. Proctor and Gamble Co., 356 U.S. 677, 78 S. Ct. 983 (1958), Your Honors pointed to the direction the trial court in this case should have taken:

> "That discovery '...together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent'".

Most recently, it was stated by the Court in the case of Oppenheimer Fund, Inc. v. Sanders, <> U.S. <>, <> Supreme Court <>, 1978 Fed. Sec. L. R.P.T.R. 96, 470 (June 19, 1978) that a court may

allow discovery to aid in determining whether it has in personam or subject matter jurisdiction. The Court states at page 93,717 of that opinion:

> "The general scope of discovery is defined by Fed. Rule Civ. Proc. 26(b)(1) as follows:
>
> > 'Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonable calculated to lead to the discovery of admissible evidence.'
>
> "The key phrase in this definition - 'relevant to the subject matter involved in the pending action' - has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. See Hickman v. Taylor, 329 U.S. 495, 501 (1947).[12] Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the

issues. Hickman v. Taylor, supra, at 500-501. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation[13] that are not related to the merits.

[12] "[T]he court should and ordinarily does interpret 'relevant' very broadly to mean matter that is relevant to anything that is or may become an issue in the litigation.' 4 J. Moore, Federal Practice Par. 26.56[1], p. 26-131 n. 34 (2d ed. 1976).

[13] For example, where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues. See 4 J. Moore, Fed. Practice Par. 26.56[6] (2d ed. 1976); Note, The use of Discovery to Obtain Jurisdictional Facts, 59 Va. L. Rev. 533 (1973)."

The innate fairness of these directives has been recognized and followed in almost every instance in which an Appellate Court has had an occasion to review the dismissal of an action by a District Court prior to allowing a reasonable period for discovery -- the outcome has been reversal of the District Court.

II.

ARGUMENT ON THE LAW

Norton filed three sets of affidavits with the District Court in support of its contentions that

it does not do business in the State of Mississippi. The first set stated that Norton had absolutely no contacts with, nor did it do any business within the confines of the State of Mississippi. In response to this set and in the face of the District Court's denial of discovery, Petitioner, pursuant to his own investigation, filed affidavits and exhibits which contradicted Norton's assertions.

Thereafter, Norton filed its second set, admitting what Petitioner's investigation had proven but again denying that it was "doing business" within Mississippi. Further investigation by Petitioner demonstrated that certain representations in this set were also untrue, whereupon Norton filed its third set of affidavits.

Thus, Washington had attempted the impossible task of proving facts which were solely within the knowledge of Norton, and succeeded to the point of being able to cast doubt on the affidavits. Yet, in ruling on the Motions to Dismiss, the District Court relied on this third set of Affidavits. Washington was thus forced to attempt to prove the validity of his cause without the key procedural protections provided by the Federal Rules of Civil Procedures and enforced by this Court. Washington's search did indeed "end in the dark".

The situation before the District Court was thus one in which the independent investigation

definitely supported Petitoner's position that further discovery would demonstrate facts sufficient to constitute a basis for jurisdiction. However, the District Court initially refused to consider Petitioner's motions to defer and to compel discovery and then proceeded to deny these motions. Such a refusal of discovery was contrary to the holdings of this Court and the Courts of Appeal and constituted an abuse of discretion.

III.

THE COMMENTATORS MAKE IT CLEAR THAT THE DECISION BELOW IS IN ERROR

The treatise writers agree that discovery is to be allowed in those instances where the defendant is in sole possession of those facts which will ultimately determine whether a dismissal will be granted.

As Moore states (4 Moore's Federal Practice, Sec. 26.25)(6) at p. 26-118-26-191):

> "Despite a few early cases to the contrary, it is clear that discovery may be had to inquire into facts relating to jurisdiction of the court over the person of the defendant, jurisdiction over the subject matter of the controversy, jurisdiction over property or facts relating to venue. The District Court operates within relatively broad limits of discretion in hearing motions under Rule 12(b), and it has been held that the judge may dispose of such a motion on affidavits, may take oral testimony, or may permit discovery. In cases in which jurisdiction depends upon complicated facts, how-

ever, it has been held that it is error to grant a motion to dismiss without affording the plaintiff an opportunity for discovery.

Please see also, 2A Moore's Federal Practice, Sec. 12.14 p. 2335-2336.

Wright states, (Wright & Miller, Rule 12 Sec. 1350 pp. 558-559):

> 'The Court may postpone a decision on the jurisdictional issue for several other reasons, * * * also may allow discovery to be completed on the issue and a further hearing to be held before ruling on the motion.

Therefore, unless it is absolutely clear that discovery would not demonstate facts sufficient to constitute a basis for jurisdiction, the court must allow discovery into jurisdictional facts. This proposition was recognized, but not adhered to, by Court of Appeals in this Case:

> '. . . Therefore, having passed up the validity of the service of process, we take up the issue of whether Norton was 'doing business' within the state. If it was not 'doing business', as that term has been defined by the Mississippi Supreme Court, the trial court properly dismissed the complaint. If there is **some doubt, more discovery would have been in order.** . . . Washington v. Norton Mfg., Inc., Case No. 78-2404, p. 2393, (5th Cir. 1979).<>

Petitioner controverted two sets of affidavits filed by Norton, and showed at least more than just minimal contact by Norton with Mississippi by

the existence of a full time employee and numerous outlets in Mississippi. With such facts, who could say without doubt that Norton was not 'doing business'. Accordingly, discovery should have been allowed.

IV.

THE DECISION BELOW IS IN CONFLICT WITH THE CIRCUIT COURTS OF APPEAL

A.

FIRST CIRCUIT

In Surpitski v. Hughes-Keenan Corp., 362 F.2d 254 (1st Cir. 1966), the First Circuit allowed discovery prior to hearing on a motion to dismiss for lack of jurisdiction over the person, and discovery on the merits was also allowed.

B.

SECOND CIRCUIT

On the question of a motion to dismiss on account of allegedly improper venue, the Second Circuit, in Greene v. Oster, 20 FRD 198 at 199 (S.D.N.Y. 1957), stated:

> 'The propriety of allowing discovery upon a motion to dismiss on any of the grounds specified in (1) to (5) in Rule 12(b) is well established.
>
> * * * * *
>
> **'The defendant may not be heard that his testimony should be withheld on the very issue he himself has raised, particularly when it related to his own acts, conduct, intentions, and state of mind.'**

(citations omitted) (emphasis supplied)

In Alosio v. Iranian Shipping Lines, S.A., 307 F. Supp. 1117 at 1120 (S.D.N.Y. 1970), the Court stated:

> "Plaintiffs are entitled to pursue discovery of facts known particularly to the defendants."

Please see also, Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); Bozant v. Bank of New York, 156 F.2d 737 (2d Cir. 1946); Green v. Oster, supra; Weisman v. LeLandais, 532 F. 2d 308 (2d Cir. 1976); Anderson-Friberg, Inc. v. Justin R. Clary & Son, 93 F. Supp. 75 at 83 (S.D.N.Y. 1951) [antitrust case in which depositions were allowed on the propreity vel non of the venue]; and General Ind. Co. v. Birmingham Sound Reproducers, Ltd., 56 F.R.D. 559 (E.D. N.Y. 1961) [Motion to Dismiss for lack of jurisdiction over the person held in abeyance until interrogatories were answered and the plaintiff had otherwise completed his "jurisdictional discovery"]. Please also see Investment Properties International, Ltd. v. IOS LTD., 459 F. 2d 705 (2d Cir. 1972) at p. 707, discussed infra.

In George C. Frey Ready-Mixed Con. v. Pine Hill Concrete Mix Corp., 554 F. 2d 551 at 555 (2d Cir. 1977) the Court stated:

> "It follows that summary judgment should not be granted when the facts disputed concerning effect on interstate commerce, as to which a plaintiff cannot be expected to have sufficient knowledge until

discovery has taken place."

The Frey Court continued at 555 n.4:

> "[4] Typically a plaintiff in an antitrust case will be able to allege specifically those acts said to cause him injury, as was done here, but will be unable to do more than generally alleged that the defendant is engaged in interstate commerce, an indispensible element of a cause of action under the antitrust laws. Not until discovery will the books and records of a defendant confirm or deny the requisite interstate connection. The value of such discovery is well illustrated in this case."

C.

THIRD CIRCUIT

In Costlow v. United States, 552 F. 2d 560 at 563-564 (3d Cir. 1977), citing Ward v. United States, 471 F. 2d 667, 670-671 (3d Cir. 1973), the Third Circuit reversed the granting of a motion for summary judgment:

> "But by acting on the motion for summary judgment without argument, and without reference to what might be developed in discovery, which was being diligently pursued, the court erred."

> "[We] have said that where the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course."

D.

FOURTH CIRCUIT

In Lekkas v. Liberian M/V Caledonia, 443 F.2d

10, 11 (4th Cir. 1971) the Court was faced with jurisdictional questions involving several foreign corporations with ultimate control by an American interest. In that case neither Goulandris, an English corporation, nor United, a New York corporation, answered interrogatories about facts bearing on issues of jurisdiction and Valencia, a Panamanian corporation, answered that its ownership was evidenced by "bearer stock". Stock ownership was a factor the Court wanted to consider in reaching a decision on jurisdiction. The defendant in that case explained that the holders of its bearer stock were unknown. Rather than accepting this explantion at face value as was done in the present case, the court felt that such an explanation was entitled to little credence. The Court stated that:

> "Valencia's explanation that the holders of its bearer stock are unknown is entitled to little credence. The corporation owns only the Caledonia [a vessel] and surely its officers and directors know who voted the stock at its last annual meeting and the identity of the person to whom they are responsible. When the owner asked the Court to decline jurisdiction it subjected itself, its agents and those to whom it entrusted the vessel to the obligation of furnishing on request all pertinent information for decision of its motion.
>
> ". . . before acting [in determining jurisdiction in an admiralty case brought by a foreign seaman] the district court should be fully informed about all factors that have a significant bearing on the question of retaining jurisdiction.

> • • •
>
> "If the defendants do not promptly and forthrightly disclose the facts necessary for decision of this issue, the district court should apply sanctions under Fed. R. Civ. P., 37, and for the purposes of this case, take as established that the ship is owned by American interests; or, if justice requires, the court should enter a default judgment on the issue of liability.
>
> • • •
>
> "The judgment of the district court is vacated and this action is remanded for completion of discovery on the shipowner's motion to decline jurisdiction."

E.

FIFTH CIRCUIT

The decision by the Fifth Circuit herein is contrary to its own prior precedents.

In the case of Davis v. Asano Bussan Co., 212 F. 2d 558 (5th Cir. 1954), where the issue of jurisdiction rested on a determination of whether a particular individual was an agent of an alien corporation, it was held that the plaintiff was not required to rely exclusively on affidavits furnished by the defendant, but had a right to employ interrogatories to develop fully the authority or lack of authority of an individual as an agent for the corporation.

The Fifth Circuit stated in Burns v. Thiokol Chemical Corp., 483 F. 2d 300, 305 (5th Cir. 1973):

> "But the Judge's discovery rulings, like his other procedural determinations are not entirely sacrosanct. If he fails to adhere to the liberal spirit of the Rules we must reverse."

In Parrish v. Board of Commissioners of Alabama State Bar, 533 F. 2d 942 (5th Cir. 1976), the Court stated at p. 947:

> "In effect, the argument of appellees amounts to a contention that a mere denial of improper conduct by the party against whom discovery is sought is adequate to support a refusal to compel discovery, unless the opposing party is able to counter such denial by specific affidavit. Such a rule would frustrate the discovery process and tend to erect an unreasonably protective shield around parties possessing material relevant and necessary to fair litigation. This result would be particularly unjust for plaintiffs seeking to vindicate civil rights where different parties utilize the terminology 'discrimination' with different meanings according to the idea of the person using the term."

The Court continued at p. 948:

> "Of course, the whole purpose of discovery in a case in which a motion for summary judgment is filed is to give the opposing party an opportunity to discover as many facts as are available and he considers essential to determine whether he can honestly file opposing affidavits. We conclude that the granting of the motion for summary judgment by the trial court without requiring the production of the documents requested deprive the appellants of an opportunity to develop the facts on which they sought to create a fact issue before the trial court."

In Littlejohn v. Shell Oil Co., 483 F. 2d 1140, cert. den. 414 U.S. 1116 (1975), a case in which the district court granted summary judgment on the basis of an alleged absence of subject matter jurisdiction, the Fifth Circuit, in an en banc decision, reversed the district court and stated:

> "The problem is procedural. This case was handled procedurally in the latter day trial concept of notice pleading, discovery, pre-trial conference or conferences, and motions, with a trial to follow only if all else fails. The fatality rate in summarily disposing of litigation in this manner is high indeed, and largely the result of prematurity through inordinate attention to theories of law at a time when the facts have not been fully developed.
>
> "Here the legal theories going to jurisdiction were clear. The problem, known to all once the issue was joined, was whether there had been interstate sales. The defendants were insistent that there had not been. Somehow, in addition to the usual prolix non-trial proceedings, here the case was bifurcated or at least disjointed to the extent that the court intended to pass on the motions for summary judgment without regard to the ongoing discovery proceedings. Plaintiff's position was that he could not show interstate sales without discovering the facts from defendants to show

such sales. He filed requests that the court forego ruling on the motions pending the completion of discovery. The court did not rule on the request but granted the motions." at 1145.

Petitioner timely initiated discovery on the key facts necessary in this case for an informed opinion by the Court on the jurisdictional issues in this case. The frustration of discovery, particularly after the impeachment of the validity of the affidavits, was in error. Please also see Dollar v. Long Mfg. N.C., Inc., 561 F. 2d 613 (5th Cir. 1977)

F.

SIXTH CIRCUIT

In Laufman v. Oakley Bldg. & Loan Co., 72 F.R.D. 116, 121 (W.D. Ohio 1976), the Court stated:

> "[w]e should be wary of denying plaintiffs [sic] full and adequate discovery based on defendants' undifferentiated fears and suspicions, lest we deny them their day in court.

G.

SEVENTH CIRCUIT

The Defendant in Mossner Porsche Audi, Inc., v. Volkswagenwerk, A.G., 397 F.Supp. 71 (E.D. Wis. 1975) moved to dismiss for lack of personal jurisdiction and failure to state a claim upon which relief could be granted. Both parties had filed affidavits in support of their particular positions on the jurisdictional issue. The Court upheld the plaintiff's motion for a continuance:

> "Given the nature of the information needed by the plaintiff in order to respond to WVAG's motion to dismiss, that the information is within the control and possession of the defendants, and the foreign location of VWAG, a continuance for the purpose of permitting the plaintiff an opportunity to take discovery is particularly appropriate. Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); Fraley v. Chesapeake & Ohio Railway Company, 397 F.2d 1 (3d Cir. 1968). Accordingly, the plaintiff's motions for continuance should be granted; it should complete its discovery for this purpose and file its brief with the court within four months."

Please also see Goldman v. Checker Taxi Company, 325 F.2d 853 (7th Cir. 1963) [limitation by the district court on discovery was improvident and affected plaintiff's substantial rights] and Metropolitan Sanitary District v. General Electric Co., 208 F.Supp. 943, 6 F. Rules Serv. 2d 4.f.22 case 1 (N.D. Ill. 1962), [district court allowed discovery on a motion to dismiss for lack of in personam jurisdiction].

In Lavin v. Illinois High School Association, 527 F. 2d 58 (7th Cir. 1975), the Court stated at page 61:

> "In a case such as this where the motivation behind coach Fontana's decision is in issue, summary judgment should be used cautiously and all procedural requirements should be given strict adher-

ence: 'It is especially important to observe these procedural requirements [fair opportunity to conduct such discovery as may be necessary] when evidence of motivation is of critical importance.' Illinois State Employees Union v. Lewis, 473 F. 2d 561, 565-66 (7th Cir. 1972); Tankersley v. Albright, 514 F. 2d 965, 953 n. 8 (7th Cir. 1972); Lavin might have desired to cross-examine Fontana or present her own affidavits concerning her basketball skills. She was unfairly prevented from so doing.'

H.

NINTH CIRCUIT

The Ninth Circuit recently addressed the issue in Wells Fargo & Co. v. Wells Fargo Exp. Co., 556 F. 2d 406 (9th Cir. 1977). In that case, the Court of Appeals vacated the district court's judgment on the issues of in personam jurisdiction over A.G. and subject matter jurisdiction over A.G.'s foreign activities. However, in vacating the lower court's judgment on these issues, the Court also vacated the refusal of the district judge to grant discovery and discussed the matter in some detail in a footnote.

Please see also Zeigler Chemical & Mineral Corp. v. Standard Oil Co. of California, 32 F.R.D. 241, 7 Federal Rules Serv. 2d 12.b.22 case 3 (N.D. Cal. 1962)

I.

TENTH CIRCUIT

The proper procedure and perhaps the eventual

outcome in the present case is demonstrated in Buckle v. Ling-Temco-Vought, Inc., 511 F. 2d 1033 (10th Cir. 1975). In that case, the Tenth Circuit affirmed a district court's order quashing service and dismissing the claim for lack of jurisdiction, stating at p. 1035:

> 'When a defendant moves to dismiss for lack of jurisdiction, either party should be allowed discovery on the factual issue raised by that motion . . . We do not believe the trial court abused its discretion here. The court had granted appellant 30 additional days [beyond the 60 days Appellant had already had since Appellees filed their motions to quash process and to dimsiss the complaint] to obtain affidavits, interrogatories, depositions, etc; the court order dismissing the complaint was filed several weeks after the 30-day extension expired.'

In Rich v. Martin Marietta Corporation, 522 F.2d 333 (10th Cir. 1975), the Court in reversing, stated at p. 343:

> 'Plaintiffs maintain that the limitations which were imposed on them in conducting their discovery constituted prejudicial error. In our opinion the court should have allowed the facts to be explored, for there were no other means of ascertaining whether there was merit in the allegations of the plaintiffs. If the answers to interrogatories failed to establish discrimination, the doubts would be dispelled and the matter would be ended. **To frustrate the search is a most unsatisfactory result in that it fosters suspicion.**' (emphasis supplied)

Please see also Umdenstock v. American Mort-

gage and Investment Co. of Oklahoma City, 495 F. 2d 589 (10th Cir. 1974) and Lamp Liquors, Inc. v. Adolph Coors, Co., 410 F. Supp. 536 (D. Wyo. 1976).

J.

D.C. CIRCUIT

In Collins v. New York Central System, 327 F.2d 880, 7 Federal Rules Serv. 2d 12.b.22 case 2 (D.C. Cir. 1963), the Court reversed the granting of a motion to dismiss for lack of jurisdiction over the person, stating:

> "Action on the motion to dismiss should have awaited answers to the interrogatories, except as the interrogatories might be subject to valid objection." (citation omitted)

CONCLUSION

Mississippi has followed the guidelines set forth by the United States Supreme Court, in International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, regarding the applicable test for determining when a corporation is "doing business" in a particular judicial district so as to make the corporation amenable to service of process within that district. However, the issue of "doing business" is a factual issue. Being such, the plaintiff who wishes to avail himself of the service of process provisions of Mississippi law must establish the necessary contacts to support such service. The plaintiff who finds

himself in such a position is faced with two possibilities:

1) He can undertake to do a factual investigation himself, a process which necessarily begins "in the dark", may never render any facts of value, and is very expensive.

2) He can engage in discovery to ascertain the extent of the defendant's contacts with the forum state. If the discovery proves fruitless, he has invested relatively little of his client's money, the defendant suffers little inconvenience, the defendant may then be dismissed for lack of personal jurisdiction, and real and substantial justice has been done.

Washington attempted to pursue both alternatives simultaneously. Due, however, to the refusal of the District Court to permit any discovery, the search was frustrated, although substantial evidence was uncovered to place doubt on the "facts" alleged by Norton in its affidavits. Once Petitioner had borne the burden of casting doubt on the veracity of the affidavits of Norton, discovery was no longer a matter of discretion.

As Judge Brown stated in Reeves v. City of Jackson, 532 F.2d 491 at 494 (5th Cir. 1976):

> "The District Court should give the plaintiff the full fanfare of a federal court claim at least until it can see what the real facts are. If, after a full development of the facts the plaintiff's cause is too weak to string the Constitution's bow or unsheath the sword

provided for the redress of such grievances under Mississippi law, it may be washed out on summary judgment, see, e.g., Bruce Construction Corporation v. United States, 5 Cir., 1957, 242 F.2d 873, or if it gets beyond that, by motion for directed verdict either at the end of the plaintiff's case, or at the close of the evidence, or by J.N.O.V. after verdict. Webb v. Standard Oil Co., 5 Cir., 1969, 414 F.2d 320, 324."

Later on in this same opinion, Judge Brown stated:

"There is enough here to permit the parties to exploit full pretrial discovery and the Court then to see what the real facts are, not what the lawyers say they are."

In Investment Properties International, Ltd. v. IOS LTD., 459 F. 2d 705 (2d Cir. 1972), Judge Oakes stated at p. 707 in reversing the vacating of notices of depositions and the stay by the district Court of discovery until decision on the jurisdictional issues:

"Discovery here, furthermore, is not a matter of mere 'housekeeping' see American Express Warehousing, Ltd. v. Transamerica Insurance Co., supra, 380 F. 2d at 284, but **is the heart of the controversy, for on it turns plaintiff-petitioners' right to be in court. The order below makes it virtually impossible to discover the facts on which jurisdiciton and standing turn, and thus puts the plaintiffs-petitioners in a cul-de-sac which the Federal Rules never contemplated.**" (emphasis supplied)

In Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 48 L.Ed.2d 338, 96 S.Ct. 1848 (1976), this Court again stated that "Dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly."

In Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed2d 458 (1962), Your Honors highlighted in the clearest possible manner the error below:

"it is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. . . . Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" (7 L.Ed. 2d at p. 464) (emphasis supplied)

When Judge Russell refused to permit any discovery whatsoever, he sounded the death knell over Petitioner's right to be in Court. Lawrence Washington was denied the right to demonstrate that he was properly before the Court. This Honorable Court should permit him his fair chance to do so. The case should be reversed and remanded with directions to permit discovery.

LAW OFFICES OF LOUIS R. KOERNER, JR.
A Professional Law Corporation

By: _____
Louis R. Koerner, Jr.
730 Camp Street
New Orleans, Louisiana 70130
(504) 581-9569

CERTIFICATE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served upon all interested counsel by placing a copy of the same in the United States Mail, postage prepaid and properly addressed, all on this 9th day of April, 1979.

_____
Louis R. Koerner, Jr.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 19

NO. 78-2404
SUMMARY CALENDAR

D. C. DOCKET NO. CA S 76-241 R

LAWRENCE WASHINGTON, Plaintiff-Appellant

versus

NORTON MANUFACTURING, INC., Defendant-Appellee,
ABC CORPORATION, Defendant.

Appeal from the United States District Court for the Southern District of Mississippi.

Before BROWN, Chief Judge, COLEMAN and VANCE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi and was tken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

It is further ordered that the plaintiff-appellant pay to the defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

January 24, 1979

Issued As Mandate:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-2404

LAWRENCE WASHINGTON,
Plaintiff-Appellant,

versus

NORTON MANUFACTURING, INC.,
Defendant-Appellee,
ABC CORPORATION,
Defendant.

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING

(FEBRUARY 2, 1979)

Before BROWN, Chief Judge, COLEMAN and VANCE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

LAWRENCE WASHINGTON,
Plaintiff-Appellant,

v.

NORTON MANUFACTURING, INC.,
Defendant-Appellee,

ABC Corporation, Defendant.

No. 78-2404
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Jan. 24, 1979.

Plaintiff, Louisiana resident and citizen, brought negligence action against foreign corporation which had allegedly manufactured grinding wheels which plaintiff had operated prior to becoming permanently disabled as a result of constant inhalation of dust particles while operating grinding wheels. The United States District Court for the Southern District of Mississippi, Dan M. Russell, Jr., Chief Judge, entered order which operated as dismissal of complaint, and plaintiff appealed. The Court of Appeals, Coleman, Circuit Judge, held that: (1) district court's order was appealable, and (2) under Mississippi law, foreign corporation was not 'doing business' in Mississippi, and therefore, district court did not abuse its discretion in refusing to allow further discovery concerning corporation's activity in

Mississippi.

Affirmed.

1. Federal Courts - 587

Where district court's order quashed service of process on corporation, granted plaintiff an additional 30 days to again attempt service of process in a lawful manner provided $500 was paid to corporation's counsel as a sanction, and further directed that complaint would be dismissed if sanctions were not paid, order was final and appealable, and it was unnecessary for plaintiff to wait for expiration of 30 days before he could appeal since he did not intend to pay sanctions.

2. Federal Civil Procedure - 1267

In a proper case, district judge has broad discretion to allow discovery on jurisdictional issues, and judge may determine these issues by receiving affidavits, interrogatories, depositions, oral testimony, or any combination of recognized methods of discovery.

3. Federal Civil Procedure - 443, 445

For purposes of federal rule providing for process upon corporation's officer, managing or general agent, or any other agent authorized by appointment or by law to receive service of process, federal, not state, standards define who such agents are. Fed.Rules Civ.Proc. rule 4(d)(3), 28 U.S.C.A.

4. Courts - 21

Valid service of process does not necessarily confer in personam jurisdiction over a defendant in a federal court. Fed.Rules Civ.Proc. rule 4, 28 U.S.C.A.

5. Federal Courts - 433

In a diversity case, federal court is bound by state law concerning the amenability of person or corporation to suit, so long as state law does not exceed limitations imposed by due process clause of Fourteenth Amendment. U.S.C.A. Const. Amend. 14.

6. Courts - 28

States are not required to assert jurisdiction to the extent permitted by due process clause if they do not choose to do so. U.S.C.A. Const. Amend. 14.

7. Corporations - 665(1)

Mississippi 'long arm' statute connot be invoked by nonresident plaintiff to establish jurisdiction over corporation which is merely doing business within Mississippi. Code Miss. 1972, § 13-3-57.

8. Federal Courts - 84

Where nonresident corporation never manufactured any grinding wheels in Mississippi, had no place of business, telephone, bank account, corporate records, or property in the state and where corporation's Mississippi's sales representative, sole employee of corporation residing in Missis-

sippi, was neither a managing agent nor a corporate officer, was not authorized to make any charges to company nor to negotiate contracts, and had not been appointed as agent to receive service of process, corporation was not 'doing business' within Mississippi under Mississippi law, and thus, in suit brought by nonresident plaintiff, district court did not abuse its discretion in not allowing further discovery concerning corporation's activities in Mississippi. Code Miss. 1972, § 79-1-27.

See publication Words and Phrases for other judicial constructions and definitions.

9. Corporations - 642(1)

Under Mississippi statute providing for assertion of jurisdiction over foreign corporation 'doing business' in Mississippi, elements of test for determining whether foreign corporation is 'doing business' within state are: foreign corporation must purposefully do some act or consummate some transaction in forum state; cause of action must arise from, or be connected with, such acts or transactions, and assumption of jurisdiction by forum state must not offend traditional notions of fair play and substantial justice, consideration being given to quality, nature, and extent of activity in forum state, relative convenience of parties, benefits and protection of the laws of the forum state afforded respective

parties, and basic equities of the situation. Code Miss. 1972, § 79-1-27.

Appeal from the United States District Court for the Southern District of Mississippi.

Before BROWN, Chief Judge, and COLEMAN and VANCE, Circuit Judges.

COLEMAN, Circuit Judge.

This case involves (1) the validity of a service of process upon the defendant corporation's sole resident Mississippi employee and (2) whether the District Court had jurisdiction over the defendant on the ground that the corporation was 'doing business' within the State of Mississippi.

The facts of the case, insofar as they are relevant to the issues presented, may be briefly recited. Plaintiff Washington is a Louisiana resident and citizen. He worked for some five years for Avondale Shipyards, Inc. as the operator of a grinding or sanding machine, which was equipped with grinding stones or wheels assertedly manufactured by the defendant. Apparently as a result of constant inhalation of dust particles at work, Washington became permanently disabled. Basing his suit upon diversity of citizenship,[1] he

sued Norton Company (Norton)[2] in the Southern District of Mississippi to recover damages allegedly caused by the defendant's negligence.

[1] In February 1978, after the Court had quashed two earlier attempts to serve process, and some seventeen months after the plaintiff filed suit, Washington learned that Norton had a sales representative residing in Mississippi. He then attempted to serve process on that representative, Donald W. Churchill. Washington then gave notice to take the deposition of Churchill. He also filed interrogatories to discover facts relevant to the issue of the Court's jurisdiction over Norton. Norton promptly moved for a protective order on the grounds that deposing Churchill would unduly prejudice and burden the company. At an expedited hearing, the District Judge quashed the service of process on Norton, through Churchill, but it granted Washington an additional thirty days to again attempt service of process in a lawful manner, provided $500 was paid to defendant's counsel as a sanction. The order further directed that the complaint would be dismissed if the sanctions were not paid. Washington did not pay the sanctions, and he appealed before the expiration of the thirty days.[3]

[2] Washington's principal complaint on appeal is that the District Judge abused his discretion by not allowing adequate discovery on the

threshold issue of "in personam" jurisdiction. It is clear that, in a proper case, the District Judge has broad discretion to allow discovery on jurisdictional issues, see 8 C. Wright & A. Miller, Federal Practice and Procedure, Section 2009 (1970); and the judge may determine these issues by receiving affidavits, interrogatories, depositions, oral testimony, or any combination of the recognized methods of discovery.

In this case, the trial judge determined that the issue of "in personam" jurisdiction over Norton could be decided upon affidavits and an oral hearing. Those affidavits revealed the following facts. Churchill, a sales representative, is the sole employee of Norton residing in Mississippi. Churchill moved to Mississippi on October 1, 1976. Prior to that time Norton had no employees in the state. The Norton Company has no separate offices in the state, and Churchill operates from an office in his own homme. He is neither a managing agent nor a corporate officer, and Norton has not authorized him to make any charges to the company. He is not authorized to negotiate contracts, and he has not been appointed as an agent to receive service of process. There are no exclusive distributors for Norton products in Mississippi, but there are some distributors who handle Norton products as well as other lines. Churchill does not write orders for Norton, but the other distri-

butors normally place orders with the company at locations in Massachusetts and North Carolina. Norton does not manufacture any grinding wheels in Mississippi, nor has it ever in the past. The company has no place of business in the state, nor does it have a company telephone number or bank account. It keeps no corporate records in the state, owns no property in the state, and has never paid any taxes to the state.

[3-6] Service of process is a mechanism for bringing notice of the commencement of an action to defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit. In the federal courts, the standards governing the validity of service of process are contained in Rule 4 of the Federal Rules of Civil Procedure. In this case, service could have been accomplished in accordance with Rule 4(d)(3)[4] or 4(d)(7)[5]. Therefore, if Washington served process upon "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process," Fed.R.Civ.P. 4(d)(3), that service of process would have been sufficient to give Norton notice of the initiation of the litigation. Federal, not state, standards define who such agents are; see 4 C. Wright & A. Miller, Federal Practice and Procedure, § 1103; cf. National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 84 S.Ct.

411, 11 L.Ed.2d 354 (1964) (use of federal standard to determine whether agent had been appointed to receive service of process under Rule 4(d)(1); but it should be noted that a valid service of process does not necessarily confer "in personam" jurisdiction over a defendant in a federal district court. In a diversity case, the federal court is bound by state law concerning the amenability of a person or a corporation to suit, so long as state law does not exceed the limitations imposed by the Due Process Clause of the Fourteenth Amendment. See, e. g., Wilkerson v. Fortuna Corp., 5 Cir. 1977, 554 F.2d 745; Walker v. Savell, 5 Cir. 1964, 335 F.2d 536; 4 C. Wright & A. Miller, Federal Practice and Procedure § 1075 (1969). States are not required to assert jurisdiction to the extent permitted by the Due Process Clause if they do not choose to do so, Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), and Mississippi has not chosen to extend its jurisdiction to the limits permitted by the Constitution.

[7] Washington's initial effort to obtain jurisdiction over Norton failed because the Mississippi "long arm" statute[6] cannot be invoked by a non-resident plaintiff to establish jurisdiction over a corporation which is merely "doing business" within Mississippi. We have recently considered this statute at length and have upheld it

against constitutional attack. Breeland v. Hide-A-Way Lake, Inc., 5 Cir., 585 F.2d 716 (1978). After his first effort to serve process failed, Washington tried to serve process on a Norton employee in Louisiana. The trial judge properly found no federal or state authority for such a procedure and correctly quashed that service of process. Finally, Washington served process on Churchill, who was Norton's only employee then resident in the State of Mississippi, asserting that Norton is amenable to suit in the state courts (and hence in the federal courts because of diverse citizenship) under the Mississippi "doing business" statute, which provides:

> Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not.
>
> Miss.Code Ann. § 79-1-17 (1972).

This statute also has a counterpart which controls the service of process in the state courts.[7] As we have seen, however, the plaintiff need follow this state procedure only if he cannot find an employee of Norton who fulfills the requirements of Rule 4(d)(3).

This case might well go off on whether Churchill was a "general agent" within the meaning of

Rule 4(d)(3). Since, however, the judgment of the District Court must be affirmed for lack of jurisdiction over Norton, we need not pause to decide the "general agent" point.

[8] Shortly after the Marshal's return of service, Norton appeared and contested the validity of the service of process, as well as personal jurisdiction. Specifically, Norton stated that it was not "doing business" within the state and was not subject to suit there. Norton has pressed this issue at every step of the litigation and has certainly not waived the defense of lack of jurisdiction over the person. See Fed.R.Civ.P. 12(h). Therefore, having passed up the validity of the service of process, we take up the issue of whether Norton was "doing business" within the state. If it was not "doing business", as that term has been defined by the Mississippi Supreme Court, the trial court properly dismissed the complaint. If there is some doubt, more discovery would have been in order. We are convinced that the issue was not in doubt and that Norton was not "doing business" within Mississippi.

In contrast to the relatively plentiful authority construing the Mississippi long arm statute,[8] there is a dearth of precedent on the doing business statute. It appears, however, that the Mississippi Supreme Court would construe the "doing business" provisions of two statutes,

§§ 13-3-57 and 79-1-27, in the same manner. In a very recent case, the State Supreme Court upheld a chancery court ruling that it had obtained jurisdiction over a nonresident corporation under the long arm statute because the corporation was 'doing business' within the state, even though the tort had been committed in Louisiana. Arrow Food Distributors, Inc. v. Love, 361 So.2d 324 (miss. 1978). In the course of its opinion, the Supreme Court stated:

> In our opinion section 13-3-57 and 79-1-27 must be read together, construed together and harmonized one with the other. When this is done and full meaning is given to the language used in each section, it is clear to us that 13-3-57 complements 79-1-27 in furthering the state's avowed policy as expressed in Vicksburg, S. & P. R. Co. v. Forcheimer, [113 Miss. 531, 74 So. 418 (1971)], to 'open the door' of our Mississippi courts to foreign corporations found doing business in this State to sue and be sued here on all bona fide causes of action. 316 So.2d at 327.

[9] Earlier cases did not differentiate between the 'doing business' statute and the predecessor to the present long arm statute in their analysis of the phrase 'doing business' statute and the predecessor to the present long arm statute in their analysis of the phrase 'doing business'. See, e.g., Knower v. Baldwin, 195 Miss. 166, 15 So.2d 47 (1943); Lee v. Memphis Publishing Co., 195 Miss. 264, 14 So.2d 351 (1943). Our case

of Gillentine v. Illinois Wesleyan University, 5 Cir. 1952, 194 F.2d 970, also construed the 'doing business' statute by reference to Mississippi decisions which had interpreted the predecessor to the long arm statute. See also Hyde Construction Co. v. Koehring Co., 321 F.Supp. 1193 (S.D.Miss. 1969). Therefore, we believe that we are on sound ground when we interpret the phrase 'doing business' of Miss.Code Ann. § 79-1-27 in the same manner as the Mississippi Supreme Court has interpreted the phrase 'doing business' of Miss. Code Ann. § 13-3-57.

The case of Mladinich v. Kohn, 250 Miss. 138, 164 So.2d 785 (1964), set forth the test for determining whether a foreign corporation was doing business within the state. The elements of the test were stated as follows:

1. The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;

2. The cause of action must arise from, or be connected with, such acts or transactions; and

3. The assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective

parties, and the basic equities of the situation.

164 So.2d at 790.

This language was subsequently quoted with approval in a series of cases. See Republic-Transcon Industries, Inc. v. Templeton, 253 Miss. 132, 175 So.2d 185 (1965); Breckenridge v. Time, Inc., 253 Miss. 835, 179 So.2d 781 (1965); Collins v. Truck Equipment Sales, Inc., 231 So.2d 187 (Miss.1970). The Court further affirmed in Smith v. Temco, Inc., 252 So.2d 212 (Miss.1979), that the application of § 13-3-57 was indeed restricted to those cases in which "traditional notions of fair play and of substantial justice" were not offended. Id. at 215. See also Miller v. Glendale Equipment & Supply Inc., 344 So.2d 736, the Supreme Court has affirmed its earlier holdings that all three factors must be met in order for a resident plaintiff to assert jurisdiction over a nonresident corporation doing business within the state. See Ga-Pak Lumber Co., Inc. v. Nalley, 337 So.2d 1270, 1274 (Miss.1976).

Even if we were certain that Norton, by selling its grinding stones for ultimate utilization in Mississippi (and this record does not indicate whether such was the case), had purposefully done some act or consummated some transaction in the state, we think that the Mississippi courts would find that their assumption of jurisdiction over

Norton would offend their "traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation." It must be remembered that when this cause of action accrued and when the complaint was filed on September 9, 1976, Norton did not have a single employee within the state. It had not then, and has not to the present, ever paid any taxes to the State of Mississippi nor availed itself of the protection of any of her laws. Furthermore, Washington had only availed himself of the protection of Mississippi's laws to the limited extent that he worked and traveled in the state, for he was a Louisiana resident and citizen. In view of the fact that the Mississippi long arm statute is not available to nonresident plaintiffs, a policy which reflects a substantial state interest, see Breeland v. Hide-A-Way Lake, Inc., supra, it seems that Mississippi would be hesitant to extent the benefits of its courts to a plaintiff who could not invoke the long arm statute but managed to serve process on a lone corporate employee who moved to the state after the commencement of the lawsuit and then only when some seventeen months had elapsed from the filing of

the lawsuit.

In such circumstances, and when one adds the facts revealed in the affidavits, we cannot find that the District Judge abused his discretion in not allowing further discovery into the "quality, nature, and extent of [Norton's] activity in the forum state." We think it clear that the quantum of that activity is less than that found in Collins v. Truck Equipment Sales, Inc., 231 So.2d 187 (Miss.1970), where the Court refused to assert jurisdiction on the grounds that the nonresident defendant corporation was not doing business in the state. See also Indianola Production Credit Ass'n v. Burnette-Carter Co., Inc., 450 F.Supp. 303 (N.D.Miss.1977) (relying on Collins to dismiss complaint); cf Holvitz v. Norfleet-Ashley, Inc., 369 F.Supp. 394 (N.D.Miss.1973) (finding that extensive corporate activities in state warranted assertion of jurisdiction). Further discovery could not have added any significant facts and would only have been expensive and burdensome for the nonresident corporation.

Therefore, the order of the Court below, which operated as a dismissal of the complaint, is

AFFIRMED.

FOOTNOTES:

1. The complaint also asserted that subject

matter jurisdiction was based upon 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1337 (commerce and antitrust laws), and 33 U.S.C. § 933 (Longshoremen's and Harbor Workers Act). The complaint does not describe how the case arises under any of these statutes, however, and we think it clear that these allegations of subject matter jurisdiction are without merit. This suit seeks damages under Mississippi law for alleged negligence, and subject matter jurisdiction can exist for a federal court only if there is diversity of citizenship.

2. The complaint names Norton Manufacturing, Inc. and ABC Corporation as defendants. The litigant now before us is Norton Company, and in view of our disposition of this case we need not decide what effect, if any, this misnomer of parties should have on the outcome. The parties have not enlightened us as to the identity of ABC Corporation, and our best guess is that there is no such corporation and that the inclusion of ABC Corporation as a defendant is a typographical error.

3. Initially we were concerned that the District Court's order might not be final within the meaning of 28 U.S.C. § 1291 because no judgment was ever entered. However, upon examination of the wording of the order, it is clear to us that

the order was final and therefore appealable. The order stated that if the sanctions were not paid, the complaint would be dismissed. If Washington did not intend to pay the sanctions, it seems unnecessary for him to wait for the expiration of the thirty days before he could appeal. Therefore, we treat this appeal as one from an order dismissing the complaint.

4. Service shall be made as follows:

Upon a domestice or foreign corporation or upon a partenership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.
Fed.R.Civ.P. 4(d)(3).

5. Service shall be made was [sic] follows:

Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the

district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

Fed.R.Civ.P. 4(d)(7).

6. Miss.Code Ann. § 13-3-57 (Supp.1978) provides, in relevant part:

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such nonresident of the secretary of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon shom all lawful process may be served in any actions or proceedings accrued or accruing from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their, or its agent, servant or employee.

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The doing of such business, or the engaging in any such work or service in this state, or the making of such contract, or the committing of such tort in this state, shall be deemed to be a signification of such nonresident's agreement that any process against it or its representative which is so served upon the secretary of state shall be of the same legal force and effect as if served on the nonresident at its principal place of business in the state or country where it is incorporated and according to the law of that state or country.

7. Section 79-1-29 provides:

Process may be served upon any agent of such foreign corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of an agent, it shall be sufficent to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon any agent of that corporation upon whom process might have been served if it were the defendant. The officer serving the process shall state the facts, upon whom issued, etc., in his return, and service of process so made shall be as effectual as if a corporation of

this state were sued, and the process has been served as required by law; but in order that defendant corporation may also have effectual notice, it shall be the duty of the clerk to immediately mail a copy of the proces to the home office of the corporation by registered letter, the postage and fees of which shall be taxed as other costs. The clerk shall file with the papers in the cause a certificate of the fact of such mailing, and make a minute thereof upon the docket, and no judgment shall be taken in the case until thirty days after the date of such mailing.

This statute simply prescribes the manner in which proces will be served on corporations which are parties to state court proceedings. It does not purport to govern in personam jurisdiction over nonresident corporations which are "doing business" within Mississippi.

8. Miss.Code Ann. § 13-3-57 has been authoritatively construed by the State Supreme Cort in a number of cases. See Arrow Food Distributors, Inc. v. Love, 361 So.2d 324 (Miss. 1978) (harmonizing §§ 13-3-57 and 79-1-27); Miller v. Glendale Equipment & Supply, Inc., 344 So.2d 736 (Miss. 1977) (jurisdiction over party owho performed contract partly in Mississippi); Ga-Pak Lumber Co., Inc. v. Nalley, 337 So.2d 1270 (Miss.1976) (limited partnership found not doing business

within state); Smith v. Temco, Inc., 252 So.2d 212 (Miss.1971) (jurisdiction over party who committed tort partly in state); E. B. Kaiser Co. v. Ludlow, 243 So.2d 62 (Miss.1971) (Corporation found doing business in state); Collins v. Truck Equipment Sales, Inc., 231 So.2d 187 (Miss.1970) (corporation found not doing business in state); Breckenridge v. Time, Inc., 253 Miss. 835, 179 So.2d 781 (1965) (corporation found not doing business in state); Republic-Transcon Industries, Inc. v. Templeton, 253 Miss. 132, 175 So.2d 185 (1965) corporation found not doing business in state); Mlandinich v. Kohn, 250 Miss. 138, 164 So.2d 785 (1964) (insufficent 'minimal contacts' for state to assert jurisdiction over an individual who gave a speech in state); cf. S & A Realty Co. v. Hilburn, 249 So.2d 379 (Miss.1971) (construing 'doing business' provision of statute which barred unqualified corporations from suing in state courts): Hilbun v. California-Western States Life Insurance Co., 210 So.2d 307 (Miss.1968) (construing 'doing business' provision of state long arm statute for insurance companies).

This Court has also construed the statue on several occasions. See Edwards v. Associated Press, 5 Cir. 1975, 512 F.2d 258 (jurisdiction over defendant predicated upon the comission of a tort); Dawkins v. White Products Corp., 5 Cir. 1971, 443 F.2d 589 (jurisdiction over defendant

predicated upon the commission of a tort); Walker v. Savell, 5 Cir. 1964, 335 F.2d 536 (construing 'doing business' provision of statute before 1964 amendment).